

STATE OF MICHIGAN
COURT OF APPEALS

NADIM BIBI and RAMONA BIBI,

Plaintiffs-Appellants/Cross-
Appellees,

v

FREDERICK FINDEISEN and JULI
FINDEISEN,

Defendants-Appellees/Cross-
Appellants.

UNPUBLISHED
September 23, 2003

No. 237525
Cass Circuit Court
LC No. 2001-000033-CH

Before: Donofrio, P.J., Fort Hood and Schuette, JJ.

PER CURIAM.

Plaintiffs-Appellants/Cross-Appellees, Nadim and Ramona Bibi (the Bibi's), appeal as of right an order encompassing a declaration of property line rights pertaining to Barron Lake, a permanent injunction, and a damage award for an assault in favor of Defendants-Appellees/Cross-Appellants, Frederick and Juli Findeisen (the Findeisen's). The Findeisen's appeal as of right the trial court's denial of their request for a declaratory judgment regarding the parties' rights and responsibilities concerning a retaining wall contained in the same order. We find that the trial court correctly drew the property lines into Barron Lake, and resultantly did not err when it issued a permanent injunction enjoining the Bibi's from encroaching on the Findeisen's property. Also, after affording the trial court due deference in its fact-finding role, we find that the trial court did not err when it held Nadim Bibi liable to Frederick Findeisen for assault. Finally, we find no clear error in the trial court's factual findings regarding the evidence surrounding the retaining wall and accordingly hold that the trial court's denial of a declaration of rights and responsibilities regarding the retaining wall was proper. We affirm.

The parties own adjoining parcels of land on Barron Lake in Cass County and at issue in this case is bottomland ownership. On appeal, the Bibi's first argue that the trial court erred when it determined that Barron Lake is an irregularly shaped lake and decided the parties' bottomland ownership and lake frontage in accordance with that finding. This Court affirms a trial court's findings of fact unless clearly erroneous. MCR 2.613(C). A finding of fact is clearly erroneous if, after a review of the entire record, this Court is left with a definite and firm conviction that the trial court made a mistake. *Trout Unlimited, Muskegon-White River Chapter v City of White Cloud (After Remand)*, 209 Mich App 452, 456; 499 NW2d 188 (1995).

In Michigan, a riparian owner's title to property extends to the center of an inland lake or stream. *West Michigan Dock & Market Corp v Lakeland Investments*, 210 Mich App 505, 509; 534 NW2d 212 (1995). When apportioning relict land, the key consideration should be fairness. *Mumaugh v McCarley*, 219 Mich App 641, 647; 558 NW2d 433 (1996). Each riparian owner should be apportioned a share of the new lakefront that is proportionate to that owner's prior lakefront ownership. *Id.* The method used to determine ownership of lands formed by reliction depends somewhat upon the shape of the body of water involved. *Gregory v LaFaive*, 172 Mich App 354, 362; 431 NW2d 511 (1988).

If the lake is circular, the shoreline is the base and the center line is the vertex of a triangle. If the lake is oblong the lines are drawn perpendicular to a median center. If neither of these methods are [sic] possible, the lake bed is divided in proportion to the shoreline owned. The theory on all events is that the shore owners take ratably. [*Id.*, quoting 6 Thompson on Real Property (1962 Replacement), § 3078, 1965 Supp, p 18, as quoted in *Weisenburger v Kirkwood*, 7 Mich App 283, 291; 151 NW2d 889 (1967).]

Our review of the record reveals that the trial court considered the evidence in the record consisting of a survey prepared by Roger Stephenson, a licensed surveyor, and Stephenson's testimony regarding the methods he employed when he prepared the survey. The court heard both the direct and cross-examination of Stephenson and also extensively questioned Stephenson. It was the opinion of Stephenson that the lake was not a circular lake or an oblong lake, but rather an irregularly shaped lake. Contrary to the Bibi's assertions on appeal, although Stephenson characterized the lake as both oblong and irregular during his testimony, it was clear that the lake had to be treated in an irregular fashion to achieve fairness in proportioning the lake frontage.

After considering the evidence and applying the relevant law, the trial court was satisfied that the lake was "irregular in nature" and that "the method employed by Roger Stephenson [was] the correct and the fairest way to extend the riparian ownership in terms of defining the boundaries of bottomland into Barron Lake." Absent the presentation by the Bibi's of a conflicting survey and opinion or some other evidence, the trial court was entitled to accept Stephenson's survey and correctly fixed the boundary line as an extension of the south line of the Findeisen's property from the southeasterly corner "at an angle of ten degrees twenty-seven minutes running out to the center of the lake as [Stephenson] plotted it in that section of this irregular lake." Because we find that the trial court correctly drew the property lines into Barron Lake, the trial court did not err when it issued a permanent injunction enjoining the Bibi's from encroaching on the Findeisen's property including the lake bottomland.

The Bibi's next argue that the trial court erred when it held Nadim Bibi liable to Frederick Findeisen for assault. Again, findings of fact by the trial court will not be set aside unless they are clearly erroneous. MCR 2.613(C). An appellate court will give deference to "the trial court's superior ability to judge the credibility of the witnesses who appeared before it." *Rellinger v Bremmeyr*, 180 Mich App 661, 665; 448 NW2d 49 (1989).

An assault is either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery. *People v Terry*, 217 Mich App 660, 662; 553 NW2d 23 (1996). In this case, there was conflicting testimony about an incident

that occurred when Nadim Bibi was installing a pier. The Findeisens believed Bibi was installing the pier on their land. Frederick Findeisen approached Bibi as he was installing the pier. Findeisen testified that Bibi walked over to him and chest-butted him and then swung at him with a hammer. Bibi testified that Findeisen ran toward Bibi and bumped into him. Bibi also testified that he was holding a hammer, but never raised or swung the hammer at Findeisen.

Clearly this issue presents a question of credibility for the Court. It is the factfinder's responsibility to determine the credibility of trial testimony. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999); *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996). The trial court stated:

The Court finds the Findeisen's testimony more credible in this respect. There is no doubt that Mr. Bibi had the hammer in his hand, was tremendously upset, and no doubt swung the hammer.

After reviewing the record, affording due deference to the trial court in its fact-finding role, we hold that the findings of fact are supported by the evidence and are not clearly erroneous. Thus, we find the trial court did not err when it held Nadim Bibi liable to Frederick Findeisen for assault.

On cross-appeal, the Findeisens argue that the trial court erred when it failed to make a declaratory judgment regarding the duties and responsibilities of the parties in maintaining a support wall located between the parties' adjoining property. The Findeisen's testified that the support wall is deteriorating and in need of repair. The trial court recognized that as of the time of its opinion, the only damage that occurred had been some soil erosion from the Findeisen property to the Bibi property due to a gap near the bottom of the wall.

While review of a declaratory judgment is de novo, the trial court's factual findings will not be reversed unless they are clearly erroneous. *Auto-Owners Ins Co v Harvey*, 219 Mich App 466, 469; 556 NW2d 517 (1996). Pursuant to MCR 2.605(A)(1), a trial court has the discretion to declare the rights and legal responsibilities of the parties to an actual controversy. *Allstate Ins Co v Hayes*, 442 Mich 56, 65; 499 NW2d 743 (1993).

Here, the trial court recognized that an adjacent property owner has a duty to provide sufficient lateral support when excavating or changing the level of the property, but found that no such action has occurred in this case. Also, the trial court found that although at the time of the opinion, boundary survey's had been commissioned, but no boundary surveys were introduced into evidence. The trial court noted that Frederick Findeisen opined that "perhaps two-thirds of the wall belonged to the Bibis, [sic] while approximately one-third may belong to him." For all of these reasons the trial court found the evidentiary record an insufficient basis upon which to issue a declaratory judgment.

Plainly, questions of fact buttress this issue. After reviewing the record we find no clear error in the trial court's factual findings regarding the evidence, or lack thereof, surrounding the retaining wall as it pertains to the Findeisen's request for declaratory relief. Accordingly, we find no error in the trial court's denial of the Findeisen's request for a declaration of rights and

responsibilities regarding the retaining wall.

Affirmed.

/s/ Pat M. Donofrio

/s/ Karen M. Fort Hood

/s/ William D. Schuette